Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

LESLEY GAY BLACKNER,

Petitioner,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

Pursuant to a uniform agreement with its customers, Continental Airlines, Inc. ("respondent" or "Continental") imposes a financial penalty for replacement of lost tickets. Although respondent introduced the challenged provision, New Jersey's state courts held that the Airline Deregulation Act, 49 U.S.C. § 41713 ("ADA") preempts the right to challenge the provision in a court proceeding. This holding is inconsistent with *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) ("*Wolens*"), in which this Court expressly held that the ADA does not preempt common law claims arising out of privately ordered contracts. New Jersey distinguished *Wolens* on the grounds that *Wolens* involved the enforcement of a contract provision, while petitioner would void one. Thus, the question presented is,

Does the holding of the Superior Court of New Jersey, Appellate Division, that the ADA preempts petitioner's entitlement to challenge the validity under common law of a penalty provision in a contract created by respondent, conflict with *Wolens*?

PARTIES TO THE PROCEEDING

The following list identifies all parties to the proceeding in the Superior Court of New Jersey, Appellate Division.

1. Lesley Gay Blackner

2. Continental Airlines, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Pursuant to its standard contract for the sale of airplane tickets, respondent charges a penalty to customers who lose their tickets prior to boarding a flight. The penalty is not related to any costs incurred by respondent in replacing lost tickets. Under the common law of contracts, uniform across the nation, contractually ordered penalties are unenforceable. Petitioner brought this lawsuit sounding in contract law to dispute the enforceability of respondent's penalty provision. The Superior Court of New Jersey, Appellate Division, held that petitioner's claim is preempted by the ADA. The holding should be reversed. It conflicts with *Wolens*, in which this Court held that the ADA does not preempt common law contract claims.

OPINIONS BELOW

The New Jersey Supreme Court issued no opinion. Its order, filed September 11, 1998, denied petitioner's request for certification to the Appellate Division. Appendix D at 17a. The opinion of the Appellate Division has been reported at 311 N.J. Super. 10, 709 A.2d 258, and is included at Appendix A at 1a. The order of the Superior Court of New Jersey, Law Division, granting respondent's motion to dismiss, and the transcript underlying the order, are included at Appendix B, 8a and Appendix C, 10a, respectively.

STATEMENT OF JURISDICTION

The Supreme Court of New Jersey entered its order denying petitioner's petition for certification on September 11, 1998. This Court has jurisdiction under 28 U.S.C. § 1257(a) because petitioner seeks review of a "[f]inal judgment...or decree...rendered by the highest court of a State in which a decision could be had" (here, the Appellate Division) and respondent claimed (and obtained) immunity from suit under a statute of the United States.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 41713(b)(1) provides:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service or an air carrier that may provide air transportation under this subpart.[1]

49 U.S.C. § 40120(c) provides: "A remedy under this

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[1] At the time the dispute in *Wolens* arose, the operative provision of the ADA was codified at 49 U.S.C. § 1305. In 1994, Congress recodified this provision at 49 U.S.C. § 41713. As both the majority and dissent noted in *Wolens*, Congress intended this revision to make no substantive change. *See Wolens*, 513 U.S. at 224, n.2, 238, n. 1.

part is in addition to any other remedies provided by law."[2]

STATEMENT OF THE CASE

A. The Practice At Issue.

Pursuant to a form contract that it drafted and incorporates into every airplane ticket purchase, respondent imposes penalties on passengers seeking to replace lost tickets. As in this case, the penalty can represent over 50% of the ticket price, and over 100 times the actual costs of replacing the ticket. The particular facts alleged here, and deemed true at the motion to dismiss stage, are as follows.

On March 18, 1996, petitioner paid $210 to Continental for a round-trip ticket between Jacksonville, Florida, and Newark, New Jersey. *See* Appendix of Plaintiff-Appellant to the Superior Court of New Jersey, Appellate Division, at Pa2. Prior to boarding her return flight from Newark, petitioner discovered that she had lost her ticket and so informed a Continental agent at the airport. *Id.* The agent told petitioner that she could not board the plane unless she purchased a new ticket. She then could apply for a refund respecting her original ticket, less a $60 penalty. *Id.* at Pa3. Confronted with the prospect of either paying the penalty or missing the flight,

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[2] This section formerly was codified at 49 U.S.C. § 1506. Although Congress altered the wording of this section in its 1994 revision, the Revision Notes explain that the change merely was "to eliminate unnecessary words and for clarity and consistency in the revised title and with other titles of the United States Code," 49 U.S.C. § 40120, Historical and Statutory Notes, *citing* House Report No. 103-180. The pre-1994 version was the operative one in the *Wolens* case.

petitioner had no realistic choice. She was forced to purchase another ticket and pay the penalty. *Id.* The penalty represented 57% of the cost of the return portion of the ticket. *Id.* Continental has not disputed that the charge bears no reasonable relationship to the costs incurred.

An electronic, computer-generated, ticket would have sufficed to permit petitioner to board her plane. The cost of issuing a replacement ticket electronically is about 50¢, less than 1/100th the penalty. Even were an actual paper ticket necessary, that would have cost no more than $8-10. *Id.* at Pa4. Thus, the $60 replacement charge is unrelated to any actual loss sustained by Continental for the issuance of a new ticket. It is, in a word, a penalty, and a spokesperson for another airline has characterized a comparable charge as being such. *Id.* Continental imposes the same penalty on any passenger unable to produce his/her paper ticket at the boarding gate.

B. The Proceedings Below.

1. The Trial Court. Petitioner commenced this case on November 14, 1996. She sought to avoid Continental's illegal imposition of an unenforceable penalty. Continental answered the complaint on January 16, 1997, and then moved to dismiss on April 2, 1997, which the trial court granted on June 2, 1997. Appendix B at 8a. The order dismissing the action contained no analysis. However, in the transcript of the hearing that had taken place on May 30, 1997, the court expressed what appears to be its underlying reasoning: "[If] there's a breach of... contract, the action lies in the states. To the extent that there is some problem with that contract...you have to take it up with the federal authorities. I don't think the law...permits me to intrude on that area in determining what is

and what is not a proper contractual term enforceable in this state." Appendix C at 10a.

2. The Appellate Division. Petitioner appealed the dismissal to the Superior Court of New Jersey, Appellate Division. Argument was heard on March 9, 1998, and a decision affirming the opinion below was issued on April 24, 1998. Appendix A at 1a. Remarkably, the decision acknowledged that this Court in *Wolens* had "held that suits based on the alleged contract between the airline and its customers were not preempted," but attempted to limit the holding of *Wolens* on the grounds that in this matter "what plaintiff seeks is not to enforce the contract but to overturn it through a declaration invalidating the $60 surcharge provision. And she seeks that relief because she claims that the surcharge provision constitutes a penalty and is thus barred by the law of this state." *Id.* at 5a.

3. The New Jersey Supreme Court. Petitioner sought certification of the judgment, and on September 11, 1998, the New Jersey Supreme Court, without opinion, and on a single page executed by the clerk of that court, wrote: "It is ORDERED that the petition for certification is denied, with costs." Appendix D at 17a.

REASONS FOR GRANTING THE PETITION

THE HOLDING OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THAT THE ADA PREEMPTS PETITIONER'S CLAIM, IS IN CONFLICT WITH THIS COURT'S DECISION IN *WOLENS* AND LEFT PETITIONER WITH NO REMEDY IN ANY FORUM.

A. Under *Wolens*, a Plaintiff May Seek Recovery Arising From a Contract Dispute with an Airline Where the Issues Do Not Implicate Enforcement of a State Enacted Law or Regulation Within the Meaning of the ADA.

The Appellate Division's improper application of federal preemption deprived petitioner and all others similarly situated of a remedy for Continental's unconscionable imposition of a penalty under the private contract between the parties. The New Jersey court did so under the misapprehension that the ADA preempts petitioner's common law claim and requires the dismissal of her action. This is directly contrary to this Court's ruling in *Wolens*, that claims pertaining to a privately-ordered contract are not preempted.

To prevent states from enacting their own regulations to replace those that Congress eliminated with the passage of the ADA, Congress provided that "States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." *See Wolens*, 513 U.S. at 222-23, *citing* 49 U.S.C. 41713(b)(1).

In *Wolens*, the Court construed this provision not to preempt a common law contract claim in a case involving American Airlines' frequent flier program (AAdvantage). American had made retroactive changes to the terms of the program regarding blackout dates and limits on seats available to passengers who obtained tickets with frequent flier miles. Certain AAdvantage members brought a class action in Illinois state court that eventually reached the Illinois Supreme Court, which held that appellants could maintain actions based on both breach of contract and Illinois' unfair and deceptive trade practices ("UDAP") statute. American appealed the decision to this Court, contending that both claims were preempted by the ADA.

This Court held that common law contract claims were not preempted by the ADA. *See* 513 U.S. at 231. The Court specifically distinguished claims based on a state's statute, such as Illinois' UDAP, from common law claims asserted by a party to a private contract. *Id.* at 232-33. While state substantive policy choices set forth in a UDAP statute may be preempted, common law doctrines of contract enforcement are not. *Id.* The Court found that Congress was concerned primarily with state public policy affecting "rates, routes, or services," not adjudication of common law claims. *Id.*

The Superior Court of New Jersey, Appellate Division, limited *Wolens* to claims for the enforcement of contract provisions and held that other common law contract claims are preempted by the ADA. The Appellate Division failed to note that in *Wolens*, this Court considered and explicitly rejected such an interpretation of ADA preemption. Addressing the contention that "'some state-law principles of contract law...might well be preempted to the extent they seek to

effectuate the State's public policies, rather than the intent of the parties,'" the majority dismissed it, stating: "[C]ontract law is not at its core 'diverse, nonuniform, and confusing'" so as to pose a "large risk of nonuniform adjudication" of contract claims. *Wolens*, 513 U.S. 233 n.8 (citation omitted); *See also Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 282 (Tex. 1996) ("*Kiefer*").

State law does not vary at all as to petitioner's common law contract claim. According to the common law of every state (including New Jersey), so-called liquidated damages clauses that amount to penalties, like the $60 Continental charges for a lost ticket, are unenforceable. *See* Restatement 2d, *Contracts* § 356, and collected cases. The common law prohibition against penalties simply does not rise to the level of individual states' legislative public policy. *See Kiefer*, 920 S.W.2d at 282 (interpreting *Wolens* to mean that "contract enforcement involves so little state policy that it cannot be considered regulation of airlines preempted by the ADA," the Texas Supreme Court held a negligence claim also was not preempted because negligence law is "far more policy-neutral than specific-purpose legislation, like consumer protection laws," even though the duty of care is imposed by state law and even though negligence law is not as uniform as contract law).[3]

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[3] Since *Wolens* was decided, courts have attempted to apply the holding of that case to a variety of fact patterns, but with little uniformity of result. Thus, as noted in the text, the Texas Supreme Court held that a common law negligence claim was not preempted by the ADA. *See Kiefer*, 920 S.W.2d at 283. In *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), by contrast, the Ninth Circuit found that plaintiff's tort claims were preempted, while in *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997), the Ninth Circuit held that tort claims seeking damages for emotional

Petitioner's contract claim is no more laden with state policy than any common law claim. To tolerate Continental's contention would precipitate a glissade by which the ADA would, in the words of Justice O'Connor, "swallow all of contract law." *Wolens*, 513 U.S. at 248 (O'Connor, J., dissenting). This Court should grant *certiorari* to correct the Appellate Division's misapplication of ADA preemption.

B. The Ruling of the New Jersey Court Improperly Left Petitioner and Others Like Her with No Remedy In Any Forum.

The Appellate Division's misapplication of federal preemption deprived petitioner of any remedy because the ADA does not confer jurisdiction on the federal courts to resolve such a dispute. *See Wolens*, 513 U.S. at 232:

> [I]t [is not] plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services. The ADA contains no hint of such a role for the federal courts. In this regard, the ADA contrasts markedly with the ERISA, which does channel

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distress were preempted, while those seeking recovery for bodily injury were not. The *Gee* court added a further wrinkle by holding that although the tort claims for bodily injury could go forward, California state law providing the standard of care for such claims was preempted, so that the claims could proceed only under a "common law standard of care," 110 F.3d at 1408. In each of these cases, the court attempted to apply the reasoning of *Wolens* to determine the contours of ADA preemption.

civil actions into federal courts.

Nor is the Department of Transportation ("DOT"), charged with, among other things, regulating the commercial airline business, equipped to adjudicate such claims. *See Id.*:

> [T]he DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime...When Congress dismantled that regime...the lawmakers indicated no intention to establish, simultaneously, a new administrative process for DOT adjudication of private contract disputes...

Wolens, 513 U.S. at 232 (emphasis added). The Court elaborated:

> "[W]ho decides (here, courts or the DOT, the latter lacking contract dispute resolution resources for the task)? On this question, all agree to this extent: None of the opinions in this case would foist on the DOT work Congress has neither instructed nor funded the Department to do."

Id. at 234.

This Court's recognition that there is no other forum besides a state court for adjudicating a contract dispute with an airline was an important factor in its conclusion that the ADA does not preempt state law contract claims. *See* 513 U.S. at 230-232. The Court explained: "The conclusion that the ADA permits state-law-based court adjudication of routine breach of contract claims...makes sense of Congress' retention of the

FAA's savings clause." 513 U.S. at 232. The savings clause expressly states that remedies under the ADA are "in addition to any other remedies provided by law." 49 U.S.C. § 40120. Congress' preservation of such remedies illustrates the understanding that private contracts would be meaningless without a way to enforce them, obtain reasonable redress for their breach, and challenge the introduction of improperly onerous provisions.

In short, if petitioner cannot present her claims in state court, then she has no forum in which to present them, and airlines would be licensed to impose any contract-grounded penalties with impunity. This Court should not countenance such a result without specific indication from Congress that it intended the ADA to preclude the ordinary operation of contract law.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED APRIL 24, 1998

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5967-96T2

LESLEY GAY BLACKNER, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

vs.

CONTINENTAL AIRLINES, INC.,

Defendant-Respondent.

Argued March 9, 1998 – Decided APR 24 1998

Before Judges Newman, Collester and Lesemann.

On appeal from Superior Court of New Jersey, Law Division, Essex County.

Roger W. Kirby, admitted pro hac vice, argued the cause for appellant (Goldstein, Lite & DePalma, attorneys; Mr. Kirby of counsel, Allyn Z. Lite and Robert J. Berg, on the brief).

Peter B. Van Deventer, Jr. argued the cause for respondent (St. John & Wayne, attorneys; Mr. Van Deventer and Douglas H. Amster of counsel and on the brief).

Appendix A

The opinion of the court was delivered by LESEMANN, J.S.C. (temporarily assigned).

Plaintiff Lesley Gay Blackner appeals from a Law Division order granting defendant's motion to dismiss her complaint with prejudice. The order was based on the court's determination that plaintiff's claim was preempted by §1305(a)(1) of the Airline Deregulation Act of 1978 (ADA), 49 *U.S.C.A.* 1305(a)(1), which provides that no state may enforce any law "relating to rates, routes, or services" of an air carrier. The facts of the case can be simply stated and are essentially undisputed.

Plaintiff purchased a round-trip ticket from Continental Airlines (Continental) to travel from Jacksonville, Florida to Newark and then return to Jacksonville. The total cost of the ticket was $210. Thereafter she lost her return ticket. When she inquired of Continental, she was told that Continental would replace the lost ticket but would impose a $60 surcharge because of the loss. Believing she had no practical choice in the matter, plaintiff followed Continental's mandated procedure, but then instituted this suit.

In her complaint plaintiff alleges that the $60 surcharge bears no reasonable relationship to any cost actually incurred by Continental to replace her lost ticket. She thus describes the surcharge as a "penalty," unlawful "under the contract law of New Jersey and the other states." She also includes in her complaint additional counts for unjust enrichment and breach of a covenant of good faith and fair dealing which she says exists by implication in her contract with Continental.[1] She

1. The "contract" governing the relationship between Continental and its passengers is a lengthy document referred to as a "contract of (Cont'd)

seeks damages and counsel fees and asks that the suit be certified as a class action on behalf of all other persons who have been assessed an improper penalty by Continental because of a lost ticket.

Defendant's motion to dismiss was grounded in the preemption argument noted above. The court agreed with that position and, accordingly, dismissed the complaint. Plaintiff's appeal followed. Since we are satisfied that the trial court's decision is required under controlling decisions of the United States Supreme Court, we affirm.

The ADA, adopted in 1978, represented a significant change in Congress' regulation of the airline industry. By its enactment, Congress abandoned the approach embodied in the Federal Aviation Act of 1958 (FAA), which had empowered the Civil Aeronautics Board to regulate the interstate airline industry. By adopting the ADA, Congress determined that " 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality. . . of air transportation services. . . .' " *Morales v. Trans World Airlines, Inc.*, 504 *U.S.* 374, 378, 112 *S. Ct.* 2031, 2034, 119 *L. Ed.* 2d 157, 164 (1992). The inclusion of §1305(a)(1) within the ADA was a necessary part of that new approach:

(Cont'd)
carriage." Pursuant to 49 *U.S.C.* §41707, "an air carrier may incorporate by reference in a ticket or written instrument any term" of that contract and plaintiff's ticket here does refer to and incorporate those terms. The full contract, which is said to be available for inspection at any airport serving Continental or at any Continental office, expressly authorizes Continental to "impose a service charge of. . . $60 per ticket for handling. . . [a] request for refund of a lost ticket. . . ."

> To ensure that the States would not undo Federal deregulation with regulation of their own, the ADA included a preemption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier.
>
> [*Ibid.*]

In *Morales*, *supra*, the Supreme Court gave broad meaning to the term "relating to" rates, routes or services. It said that language not only prohibited States from "prescribing rates, routes or services" but also from taking any enforcement actions having a connection with or reference to airline 'rates, routes, or services' . . ." whether through laws "specifically addressed to the airline industry" or through more general statutes. 504 *U.S.* at 384, 112 *S. Ct.* at 2037, 119 *L. Ed.* 2d at 167-68.

The Supreme Court next dealt with §1305(a)(1) in *American Airlines, Inc. v. Wolens*, 513 *U.S.* 219, 115 *S. Ct.* 817, 130 *L. Ed.* 2d 715 (1995), which involved an airline's attempt to effect retroactive changes in its frequent flyer program. The Court held that the Illinois Consumer Fraud Act could not be imposed on an airline because to do so would represent "intrusive regulation of airline business practices" by the state, which would violate §1305(a)(1). However, it also held that suits based on the alleged contract between the airline and its customers were not preempted:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own self-imposed undertakings. . . . [T]erms and

> conditions airlines offer and passengers accept are privately ordered obligations 'and thus do not amount to a State's enact[ment] or enforce[ment] [of] any law, rule, regulation, standard or other provision having the force and effect of law within the meaning of Section 1305(a)(1).'
>
> (*American Airlines, Inc. v. Wolens, supra*, 513 *U.S.* at 228-29, 115 *S. Ct.* at 824, 130 *L. Ed.* 2d at 725-26.]

Plaintiff claims that the principle of *Wolens*, which permits state court enforcement of contracts voluntarily entered into between an airline and its customers, authorizes this suit. But plainly, that is not so.

Plaintiff does not seek enforcement of any contract she had with Continental. Quite the contrary, the contract that exists between plaintiff and the airline clearly authorizes the surcharge of which plaintiff complains. What plaintiff seeks is not to enforce the contract but to overturn it through a declaration invalidating the $60 surcharge provision. And she seeks that relief because she claims that the surcharge provision constitutes a penalty and is thus barred by the law of this state.

That reasoning is precisely what was rejected in *Wolens*, as well as *Morales*. In *Wolens*, Justice Ginsburg set out the principle clearly and succinctly: "This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 *U.S.* at 232-33, 115 *S. Ct.* at 826, 130 *L. Ed.* 2d at 728.

Plaintiff's suit clearly falls on the prohibited side of the line drawn in *Wolens*. The essence of her claim is an "enlargement or enhancement [of her rights] based on state laws or policies external to the agreement," which, she says, should invalidate a portion of the contract between her and the airline. The complaint violates the essence of the preemption provision of §1305(a)(1) and thus it cannot stand.

The conclusion we reach here is consistent with that reached in *Vail v. Pan Am Corp.*, 260 *N.J. Super.* 292 (App. Div. 1992), and also with that reached by the Seventh Circuit Court of Appeals in *Statland v. American Airlines, Inc.*, 998 *F.* 2d 539 (7th Cir.) *cert. denied*, 510 *U.S.* 1012, 114 *S. Ct.* 603, 126 *L. Ed.* 2d at 568 (1993). In *Vail*, we held, consistent with *Morales*, that the language of §1305(a)(1) must be given a broad reading and that it prohibited a state court suit seeking damages for alleged fraudulent representations by an airline that it had adopted a particular security program. We found that, "[p]laintiffs' claims quite obviously 'relat[e] to' airline fares and services" and, therefore, the suit before us was preempted by §1305(a)(1). *Vail*, *supra*, 260 *N.J. Super.* at 299.

In *Statland*, the airline had collected a penalty when plaintiff canceled a ticket she had previously bought. Plaintiff claimed the airline improperly calculated the permissible amount of the penalty and sued in state court to recover the amount in dispute. Much of the court's decision discussed plaintiff's claim that she had a right of recovery under federal law but, after the court rejected that argument, it turned to her attempt to maintain a suit under state law. That portion of plaintiff's suit was then dismissed on preemption grounds under §1305(a)(1) and the holding of *Morales v. Transworld Airlines, Inc.*, *supra*. The court said, "[w]e think it obvious that canceled

ticket refunds relate to rates." *Statland, supra*, 998 *F.* 2d at 542. We think the same here, and that the dismissal of plaintiff's complaint is, in all respects, consistent with our prior decision in *Vail* as well as with the federal precedent set forth in *Morales* and *Wolens*.

Affirmed.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY FILED JUNE 2, 1997

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Attorneys for Defendant, Continental Airlines, Inc.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. ESX-L-12831-96

Civil Action

LESLEY GAY BLACKNER, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

CONTINENTAL AIRLINES, INC.,

Defendants.

ORDER

THIS MATTER having been brought before the Court upon the motion of defendant, Continental Airlines, Inc., pursuant to *R.* 4:6-2(e) for failure to state a claim upon which relief can be granted, and the Court having reviewed the papers and arguments submitted in support of and in opposition to said motion and for good cause shown;

Appendix B

IT IS on this 2nd day of June, 1997;

ORDERED, that defendant's motion to dismiss be and hereby is granted; and it is further; –

ORDERED, that plaintiff's Complaint be and hereby is dismissed with prejudice and without costs; and it is further;

ORDERED, that a true copy of this Order shall be served upon all counsel within ten (10) days of it receipt hereof.

s/ Jack B. Kirsten
JACK B. KIRSTEN, J.S.C.

APPENDIX C — TRANSCRIPT OF MOTION DATED MAY 30, 1997

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART
ESSEX COUNTY, DOCKET NO: ESX-L-12831-96

LESLEY GAY BLACKNER,

Plaintiff

vs.

CONTINENTAL AIRLINES, INC.,

Defendant.

TRANSCRIPT OF MOTION

Place: Essex County Courthouse
50 Market Street
Newark, New Jersey

Date: May 30, 1997
Pages: 1 - 7

BEFORE:

THE HONORABLE JACK B. KIRSTEN, J.S.C.

TRANSCRIPT ORDERED BY:

ROBERT BERG, ESQ.

Appendix C

APPEARANCES:

ROBERT BERG, ESQ., (Goldstein, Lite & DePalma), Attorney for the Plaintiff

DANIEL HUME, ESQ., (Kaufman, Malchman, Kirby & Squire LLP), Attorney for the Plaintiff

PETER B. VAN DEVENTER, ESQ., (Robinson, St. John & Wayne), Attorney for the Defendant

CARMEN LILOIA, CSR, CM
Official Court Reporter
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Newark, New Jersey 07102

[2] THE CLERK: Blackner versus Continental Airlines, 12831-96.

MR. BERG: Robert Berg from Goldstein Lite and DePalma for the plaintiff.

MR. HUME: Daniel Hume from Kaufman, Malchman, Kirby & Squire, for the plaintiff.

MR. VAN DEVENTER: Peter B. Van Deventer from the firm of Robinson St. John & Wayne, for Continental Airlines.

THE COURT: This is the case of the lost ticket?

MR. VAN DEVENTER: That's correct.

THE COURT: If I had some talent here for writing, who's that fellow that writes all the books about law? Grisham? This is a plot of the good plot, the case of the lost airline ticket.

Go ahead.

MR. VAN DEVENTER: This is Continue Airlines Inc.'s motion to dismiss plaintiff's complaint, which has been couched as a class action, yet not certified. Based upon rather straight forward facts, and I would submit to your Honor from the outset that everything in this particular case and everything in this motion, and the case law itself, is black and white. And we don't have a gray area in this particular matter.

THE COURT: Very well, I read your papers, counsel.

MR. VAN DEVENTER: I'm going to make it brief, Judge, in that case.

[3] THE COURT: Huh?

MR. VAN DEVENTER: I'll make it brief in terms of my argument here. I thought —

THE COURT: All right. I guess you get paid by the word. I already read your papers —

MR. VAN DEVENTER: Should I rest, your Honor?

THE COURT: If you'd like to proceed, do so.

MR. VAN DEVENTER: No, just very briefly, Judge, since your Honor is familiar with the papers.

Appendix C

The ADA, Airline Deregulation Act, is clear as to what is preempted and what is not preempted. The Supreme Court of the United States has made it clear how that is to be interpreted. In the three cases that your Honor is very familiar with, I suggest the *Statland* case is almost a case as fact pattern as we can get.

In reviewing the papers filed in opposition, the only argument I see counsel making to maintain this action in state court is a possible breach of contract issue that might not be preempted, based upon the *Wolens* matter, and that happens to be on its face correct.

However, as I'm sure your Honor has noted in reviewing the *Wolens* case, that breach of contract action, as a state cause of action, can only remain if it is alleged that a term of the contract of carriage was breached itself.

And in this case, there can be no dispute, the [4] contract of carriage provides for the sixty dollar charge. It was charged. So, your Honor, I respectfully submit that this matter should be dismissed in light of all the case law and the ADA act.

Thank you.

MR. BERG: Good morning, your Honor.

THE COURT: All right, Sir.

MR. BERG: When we drafted this complaint, we were well aware of the case law, and in particular of the *Wolens* decision. The Supreme Court in *Wolens* said the Airline Deregulation Act does not preempt all causes of action and, in fact, it specifically said the Airline Deregulation Act permits breaches of contract actions to go forward.

With that in mind, we drafted a breach of contract cause of action here. *Wolens* allows that type of an action to proceed. It does not preempt it by the Airline Deregulation Act.

THE COURT: This is not a breach of contract, though?

MR. BERG: It is. In every contract — in no contract is a penalty permitted under the law of any of the states, including New Jersey.

THE COURT: No contract? I don't understand.

MR. BERG: You can't have a penalty.

THE COURT: I don't understand that.

MR. BERG: What happens here, Continental charges you [5] a sixty dollar penalty if you lose your ticket to reissue a ticket. The cost to Continental for reissuing a ticket, if a ticket is needed, is fifty cents. If it's done electronically, now the airlines have gone to electronic tickets, and it's eight dollars —

THE COURT: What you're saying is the provision in the contract, which creates a penalty, is against public policy and unenforceable?

MR. BERG: It's not enforceable under the Common Law of all the states in the United States. It is part of the contract law, the body of contract law prohibits the imposition of penalties in contracts.

THE COURT: I see your point. Anything else?

MR. BERG: If your Honor has any questions.

THE COURT: Sir, although I have great deal of, let's put it this way, concern about the deregulation of the airline industry, and its effect on the travelling public, as a general concern, nevertheless, I think we're bound by federal law which in effect is designed to protect the airlines from individual suits in the various states. Since the airlines travel through several states, the law seems to me clear that they approve these contracts and to the extent that they are — there's a breach of that contract, the action lies in the states. To the extent that there is some problem with that contract, it seems to me that you have to take it up with the federal authorities. [6] The fact that there maybe some clause in that contract that you feel is illegal, under Common Law, or under public policy, or because of a difference in the bargaining powers of the parties, I sympathize with you. But I don't think that the law, as I see it, and as cited by the movant here, permits me to intrude on that area in determining what is and what is not a proper contractual term enforceable in this state.

MR. BERG: Your Honor, the Texas Supreme Court in the *Kiefert* decision, which we cited, specifically addressed this issue and said that the contract law is so uniformed across the country and impinges so little upon state imposition of policy that it does not impinge upon the Airline Deregulation Act and as a result, contract law —

THE COURT: Counsel, in my experience in this case, and in citing this case, experience generally, the area that I practiced in before I went on the bench, was regulation of monopoly industry such as the airline industry. I'm perfectly aware of the laws that govern these industries. It doesn't mean I agree with

it, but I have an obligation to enforce it, and although I'm very sympathetic, believe me, with the point of view of your plaintiff in this case, I think all of us have found ourselves in the same circumstances or similar circumstances in dealing with the airlines in the past. It's a very common problem. But it's my opinion a federal problem, not a state problem. I'll grant the application for dismissal.

[7] MR. VAN DEVENTER: Thank you, your Honor.

(Matter concluded)

CERTIFICATION

I, Carmen Liloia, C.S.R., C.M., License Number 849, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of my stenographic notes taken in the above matter to the best of my knowledge and ability.

s/ Carmen Liloia 6/18/97
Carmen Liloia, C.S.R., C.M. Date

Essex County Courts Building

APPENDIX D — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION DATED SEPTEMBER 10, 1998 AND FILED SEPTEMBER 11, 1998

SUPREME COURT OF NEW JERSEY
C-1 September Term 1998
46,118

LESLEY GAY BLACKNER,

Plaintiff-Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5967-96 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 10th day of September, 1998.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX E — RELEVANT STATUTE

49 U.S.C. § 41713

UNITED STATES CODE
TITLE 49. TRANSPORTATION
SUBTITLE VII—AVIATION PROGRAMS
PART A—AIR COMMERCE AND SAFETY
SUBPART II—ECONOMIC REGULATION
CHAPTER 417—OPERATIONS OF CARRIERS
SUBCHAPTER I—REQUIREMENTS

Current through P.L. 105-216, approved 7-29-98

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition.—In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the

transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

Appendix E

(B) Matters not covered.—

(A) (i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).—This paragraph shall not limit the applicability of paragraph (1).